Supreme Court, U.S.
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86-654

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1986

NELSON GONZALEZ PEREZ, ET. ALS.
APPELLANTS

V.

COMMONWEALTH OF PUERTO RICO
APPELLE

ON APPEAL FROM THE SUPREME COURT
OF THE COMMONWEALTH OF
PUERTO RICO

JURISDICTIONAL STATEMENT

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October 17, 1986.

QUESTIONS PRESENTED

1. It is constitutionally permissible for the Supreme Court of Puerto Rico to construe judicially a penal statute and apply the same retroactively in violation of the due process of law and the prohibition of the application of laws ex post facto in violation of the Constitutional rights guaranteed by the U.S. Constitution to its citizens?
2. Are the constitutional rights of the U.S. Constitution contained in its Articles and Amendments applicable to the U.S. Citizens residents in Puerto Rico?
3. Is it permissible for the Supreme Court of Puerto Rico to repeal a penal section without having declared it to be unconstitutional?

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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1986

Nelson González Pérez
Angel Pérez Casillas
Jaime Quiles Hernández
Rafael Moreno Morales
Juan Bruno González
Rafael Torres Marrero
José Ríos Polanco
Nazario Mateo Espada
Carlos Santiago Borrero
William Colón Berríos

Appellants

VS.

Commonwealth of Puerto Rico,

Appellee

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

JURISDICTIONAL STATEMENT

Appellants Nelson González Pérez, Angel Pérez Casillas, Jaime Quiles Hernández, Rafael Moreno Morales, Juan Bruno González, Rafael Torres Marrero, José Ríos Polanco, Nazario Mateo Espada, Carlos Santiago Borrero, William Colón Berríos, appeal from the final decision of the Supreme Court of Puerto Rico rendered May 22, 1986, holding and ordering that appellants herein be prosecuted under Article 225 of the Penal Colde, 33 LPRA Section 4421, instead of Articles 33 and 34 of the Political Code of Puerto Rico, 2 LPRA Sections 153 and 154.

OPINIONS BELOW

The opinion of the Supreme Court of Puerto Rico was originally rendered in the Spanish language and has not as yet been published. A true and faithful copy of its translation into English is reproduced here as Appendix A. The translation of the Order of the Supreme Court of Puerto Rico is reproduced as Appendix A-20.

The opinion of the District Court of Puerto Rico, Utuado Part, was originally rendered in the Spanish language and it is not published. A true and faithful copy of its translation into English is reproduced as Appendix B.

The translations of both opinions are submitted on our own since the translation office of the Supreme Court of Puerto Rico notified us that it will take at least three months to translate into English all the documents we needed for our case.

JURISDICTION

In the criminal case at bar appellants challenged the validity of the application of *Act No. 115 of July 22 of 1974*, in its Article 225, 33 LPRA Section 4421, a Section of the Penal Code of Puerto Rico of a general character, on the ground that the Political Code of Puerto Rico, in its Articles 33 and 34, 2 LPRA Sections 153 and 154, are the applicable ones

because it is a special law which specifically covers the acts charged in the complaint. This allegation was granted by the District Court of Puerto Rico, Utuado Part. On May 22, 1986, the Supreme Court of Puerto Rico, by certification, reversed and made applicable to appellants, in an ex-post facto manner, the validity of the application of Article 225 of the Penal Code of Puerto Rico, in such a way as to extend the prescription period (statute of limitation) and increase the penalty. The notice of appeal was filed June 26, 1986. On August 15, 1986, Mr. Justice William J. Brennan Jr., issued an Order extending to and including October 19, 1986, the date for filing the jurisdictional statement. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1258 (2). *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 at p. 42 fn. 1 (1970) (dicta), upholds this Court's appellate jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

The application of Article One, Sections 9 and 10 which provide:

Section 9

No... or ex post facto law shall be past.

Section 10

No state shall..., pass any... ex post facto law.

Fifth Amendment:

No person... nor be deprived of..., liberty..., without due process of law.

Fourteenth Amendment:

..., nor shall any state deprive any person of..., liberty..., without due process of law.

The validity of the application ex post facto of Act. No. 115 of July 22, 1974, in its Article 225, 33 LPRA Section 4421 and Articles 33 and 34 of the Politicial Code of Puerto Rico, 2 LPRA Sections 153 and 154.

STATEMENT OF THE CASE

On July 25, 1978 two young men, Arnaldo Darío Rosado

and Carlos Soto Arriví, members of a terrorist group died in a confrontation with the police as they were about to carry out terrorist acts in certain communication installations.

In 1983 the Puerto Rico Senate in a legislative investigation summoned appellants to appear for the legislative purpose of determining whether there was a cover-up or the commission of any offense.

Subsequently the office of Independent Special Prosecutor was created by Act No. 1 of January 18, 1985 granting him full authority to prosecute criminally any person responsible for the events of July 25, 1978 in Cerro Maravilla, prior or subsequent to that date.

In 1985 criminal charges were filed for the offense of perjury, on August 6, 1985, a motion was filed by the defense requesting the dismissal of the charges for perjury under Article 225 of the Penal Code, on the ground of lack of jurisdiction since there existed in force Articles 33 and 34 of the Political Code, 2 LPRA Sections 153 and 154, which specifically regulated and sanctioned the commission of perjury before the Legislative Assembly of Puerto Rico, which is a misdemeanor. On August 29, 1985, the District Court of Puerto Rico, Utuado Part, decides that the dismissal of the 48 charges of perjury lies pursuant to the principle of specialty, pointing out that the special law which regulates the commission of perjury before the Legislature of Puerto Rico or any of its committees is the Political Code of Puerto Rico, in its Articles 33 and 34 (App. B). The Independent Special Prosecutor files a petition for certiorari before the Superior Court of Puerto Rico, Utuado Part and at the same time files in the Supreme Court of Puerto Rico a petition or motion for Certification so that it be up to the latter court to decide the question of the statute under which the charges should be filed. The Supreme Court of Puerto Rico assumes jurisdiction September 12, 1985.

The defendants-appellants raised, in brief, the following in the Supreme Court:

a) That Article 225 of the Penal Code did not cover the offense of perjury before the legislative assembly.
b) That Article 33 and 34 of the Political Code was the applicable law since it specifically covered the question of perjury before the Legislature.

c) That Article 33 and 34 of the Political Code had not been expressly nor tacitly repealed by the legislature when the new Penal Code of 1974 was created since there existed in said Code Article 255 which was identical to Article 34A of the Political Code and it was under this section that the legislature compelled the defendants herein to testify before the Senate Committee.

The Supreme Court of Puerto Rico decides on May 22, 1986 that Article 225 of the Penal Code of Puerto Rico repealed Article 33 of the Political Code. (App. A at pp. 26.) This decision aggravates the penalty and extends the prescription period inasmuch as under Article 33 of the Political Code it was a misdemeanor with a penalty of a fine from $100 to $1,000 or confinement from one month to twelve months; and, with a prescription period of one year, under Article 225 of the Penal Code, the penalty is from 6 to 10 years confinement and 3 years of prescription period.

It is on the basis of this decision of the Supreme Court of Puerto Rico which without any mention of unconstitutionality of Article 33 of the Political Code declared it to be repealed and applied retroactively Article 225 of the Penal Code with a new prescription period (statute of limitation) in violation of the due process of law and the prohibition as to the ex post facto application of laws since the offenses of perjury under Article 33 of the Political Code had already prescribed at the time the charges were filed.

It is at that moment that there arises for the first time the violation of the constitutional rights of appellants, guaranteed in Article One, Section 9, and the Fifth and Fourteenth Amendments of the U.S. Constitution since no one could have previously foreseen such determination by the Supreme Court of Puerto Rico. Furthermore, it is the first time that Article 33 of the Politicial Code is judicially construed.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

In the first place, the controversy as to which section should be applied for the prosecution of perjury is closed at state level since it cannot be raised anew before the Supreme Court of Puerto Rico, although as yet appellants have not

been criminally prosecuted before the local courts, for which reason the decision is final, as was stated in the case of *Brotherhood of Teamsters, Chauffeurs, etc.* v. *Editorial El Imparcial Inc.*, 300 F 2d 125, 126. As applicable to Puerto Rico the "phrase final decision means those decisions which, without strict regard to form in fact fully and finally adjudicate rights and terminate litigation in such way that further adjudication is precluded in Supreme Court of Puerto Rico".

As to the question that it is for the first time, at the apellate stage before this Court that the violation of rights under the Federal Constitution is raised, as well as that the due process of law be guaranted and the prohibition to apply laws ex post facto, this is due to the fact that the court engaged in the construction of the state statute in an unforeseeable fashion and it is then, because of the construction of the statute by the Supreme Court of Puerto Rico, that appellants' constitutional rights are violated under the Federal Constitution. Consequently, that is why for the first time in the appellate proceeding, the federal question is raised.

It is for the first time in the history of the Supreme Court of Puerto Rico, that Art. 33 of the Political Code as well as Art. 225 of the Penal Code of Puerto Rico, is construed. To that effect it has been said that a party whose rights under the federal constitution are prejudiced by a decision of a state Supreme Court construing a state statute for the first time, is not estopped from attacking the decision on appeal because he did not anticipate such construction in the earlier stages of the case but relied upon another, not unreasonable, construction of the statute and invoked in his own behalf. See *International Steel Co.* v. *Surety Co.*, 297 U.S. 657, 665.

Besides being unable to raise this error of the Supreme Court of Puerto Rico at the appellate stage when it could not have been previously raised, there would still exist a violation of appellants' due process of law because they would not have an adequate forum where to bring their claim of violation of their constitutional rights. This has been previoulsy held on the principle that "the basic due process concept involved is the same as that which the court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not

constitute an adequate ground to preclude this Court's review of a federal question." Bouie v. Columbia, 378 U.S. 347, 354.

It is more than justified that it be at the appellate stage that the question of violation of federal constitutional rights be raised and there does not exist any impediment precluding this court from assuming jurisdiction and we believe that such justification was construed in *Saunders* v. *Shaw*, 244 U.S. 317, 320 where it was said "But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, *it would leave a serious gap in the remedy for infraction of constitutional rights* if the party aggrieved in such a way could not come here." (underscore ours)

In the case of Lindsey v. Washington 301 U.S. 397, 400 it was express, that whether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question.

The retroactive application, of the opinion of the Supreme Court of Puerto Rico violates the constitutional protection of defendants as to the due process of law. It is a question of the substantive right of appellants where once the offense has prescribed, the state is precluded from prosecuting them nor may it construe a statute in such a fashion as to extend a prescription period.

It has been pointed out that the protection from prosecution under a statute of limitations is a substantive right, not a mere procedural one. *U.S.* vs. *Auto Rental*, 187 F. Supp. 603, *U.S.* ex rel. *Hassell* v. *Matheus*, 27 F 2d. 137. In the case at bar section 33 of the Political Code, 2 L.P.R.A., sec. 153, defines the crime of perjury before the legislative assembly as a misdemeanor. (App. C) and the prescription period for said offense is one year. At the time of filing the charges for perjury more than one year had elapsed since appellants had testified before the legislature when they allegedly committed perjury. If article 33 of the Political Code had been applied said offenses had prescribed at the time charges were filed.

Article 33 of the Political Code, 2 LPRA, Sec. 153, specifically prescribes that when the offense of perjury befo-

re an assembly is committed, it shall be a misdemeanor and Art. 34 of the same code establishes a procedure to be fallowed; there sections specifically deal with the situation of perjury before the Legislature of Puerto Rico.

Article 225 of the Penal Code 33 LPRA, sec. 4421 also deals with the offense of perjury, but does not specifically deal with the situation of perjury before the Legislative Assembly. Now, this Article 225 contains the word "body" and the Supreme Court of Puerto Rico indicates that said word may also be construed as to include the legislative assembly. When the Legislative of Puerto Rico considered the approval of Article 225 on perjury it *was not* contemplated, at any time that said Article was covering perjury before a legislative assembly or that the word body meant legislative body and it is so infered because neither in the statement of motives of the law nor when it was descussed in the legislature there appears any mention or expression covering the situation of perjury before the legislature, because it was already covered by a law of previous creation.

It has been stated that it is fundamental that the words of statutes are to be interpreted wherever possible in their ordinary, everday sense. See *Crane* v. *Commissioner*, 331 U.S. 1,6.

In construing the word "body" to mean legislature in such a broad sense as to cover the commission of perjury before a legislative assembly, said construction worked in detriment of appellants and it has been stated that when the meaning of a penal statute is doubtful the accused has the benefit of the doubt. *State* v. *Barter*, 58 N.H. 604, 607. For this reason it should have been construed to the effect that the applicable section was article 33 of the Political Code which specifically covered perjury before the Legislative Assembly. Where the language of the statute is plain and unambiguous, it declares its own meaning, there is no room for construction. When the Supreme Court of Puerto Rico interpreted that felony applied and that is substituted the misdemeanor it extended the statute of limitations from one year to three years and did so retroactively thereby eliminating appellant's defense that the crimes had prescribed.

Furthermore, it has been stated in several cases that criminal limitation statutes are to be liberally interpreted in

favor of the accused. See *U.S.* v. *Scharton*, 285 *U.S.* 518, 522, *U.S.* v. *Habig*, 390 U.S. 222, 227.

When the Supreme Court of Puerto Rico judicially interpreted that Art. 33 of the Political Code has been repealed by Art. 225 of the Penal Code, which is a subsequent law and made it application retroactive, when it should have been prospective, it violated the due process of law and the clause which prohibits the Ex Post Facto application of laws. It is well recognized that while the Ex Post Facto Clause does not apply directly to the judiciary, it is applicable by analogy through the Due Process Clauses of the Fifth Ammendment, *Marks*, v. *U.S.*, 430 U.S. 188, and the Fourthteenth Amendment to the United States Constitution *Bouie* v. *Columbia*, 378 U.S. 347.

The Supreme Court of Puerto Rico, without having declared a law to be unconstitutional or that it had been eliminated by the Legislature, repeals one part of a statue of a penal nature and substitutes it by another section which aggravates the penalty.

Increasing the authorized penalty after the fact does not deny the defendant fair notice of what conduct is criminal, *yet it still violates the rule against ex post fact criminal laws. People* v. *Stevenson*, 331 N.W. 2d. 143.

Upon eliminating Article 33 of the Political Code and interpreting that the applicable law was Article 225 of the Penal Code it aggravated the penalty and enlarged the prescription period of an offense which had prescribed under Article 33 of the Politicial Code. Such decision violates prohibition of the application of laws retroactively according to *Bouie* v. *Columbia*, 378 U.S. 347 which states 'Indeed, and unforeseeable judicial enlargement of a criminal statute applied retroactively operates precisely like an ex post facto law, such as Article I, sec. 10, of the Constitution forbids. An ex post facto law has been defined by this court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal and punishes such action", or "that aggravates a crime, or makes it greater than it was, when committed", *Calder* v. *Bull*, 3 *Dall* 386, 390.

In over case the Supreme Court of Puerto Rico, in eliminating, without legal justification, the penal part of

Article 33 of the Policital Code, 2 LPRA sec 153 and substituting it by Article 225 of the Penal Code, 33 LPRA sec. 4421 and at the same time interpret the word "body" to include the legislative body in full disregard of a previous penal section which specifically treated the matter of perjury before a legislative assembly (article 33, 2 LPRA, sec. 153), what it practically did was to apply a statute which aggravates the penalty and enlarged the prescription period retroactively, when, under the applicable statute, repealed by the Supreme Court of Puerto Rico, the offenses of perjury had already prescribed.

THE APPROPRIATION OF PLENARY CONSIDERATION

Appellants believes that the Article One section 9 and 10 and the Fourthteenth Amendment violations are clear and that the opinion and judgment of the Court below is incorrect.

In the event the Court does not decide to summarily reverse, the case should be set for plenary consideration.

Affirming the judgment or dismissing the appeal will have enormous impact in the interpretation and application of the federal constitution in the local courts of Puerto Rico.

If this Court does not want to consider the Article one section 9 and 10 issue, it may nonetheless reversed on the due process issue and we urge it to do so.

CONCLUSION

For the aforementioned reasons this Court should note probable jurisdiction and either reversed the opinion below or set the case for plenary consideration of the substantial federal question.

Respectfully submitted,

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APPENDIX A
IN THE SUPREME COURT OF PUERTO RICO

CE 85-566

THE PEOPLE OF PUERTO RICO,
PLAINTIFF-PETITIONER

vs.

ANGEL L. PEREZ CASILLAS
NELSON GONZALEZ PEREZ
JAIME QUILES HERNANDEZ
RAFAEL MORENO MORALES
JUAN BRUNO GONZALEZ
RAFAEL TORRES MARRERO
JOSE RIOS POLANCO
NAZARIO MATEO ESPADA
CARLOS SANTIAGO BORRERO
WILLIAM COLON BERRIOS
DEFENDANTS-RESPONDENTS

CERTIFICATION

OPINION OF THE COURT DELIVERED BY MR. JUSTICE ORTIZ
SAN JUAN, PUERTO RICO, MAY 22, 1986

TO THE HONORABLE COURT:

Again we are called upon to decide judicial issues related to the Cerro Maravilla event, *People v. González Malavé*, Opinion of October 4, 1985, 85 *J.T.S.*, 58; *Romero Barceló v. Hernández Agosto*, Opinion of May 1, 1984, 84 *J.T.S.*, 35; *Peña Clos v. Cartagena Ortiz*, 114 *D.P.R.*, 576 (1983); *Soto v. Secretary of Justicie*, 112 *D.P.R.* 477 (1982).

On this occasion we must decide whether persons who are accused of having testified as true certain essential facts knowing them to be false, upon testifying under oath before a Puerto Rico Senate Committee, may be prosecuted for having violated Section 225 of the Penal Code, 33 L.P.R.A. 4421, which defines and establishes the penalties for the offense of perjury[1].

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[1]Section 225 of the Penal Code of 1974 provides that:

"Every person who, having taken on oath that he will testify, declare, depose or certify truly before any competent court, body, official or person, in any of the cases or proceedings in which such an oath may be administered by law, states as true any essential fact which ke knows to be false or makes an unqualified statement of an essential fact which he does not know to be true, shall be punished by imprisonment for a fixed term of six (6) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of ten (10) years; if there should be extenauting circumstances, it may be reduced to a minimum of four (4) years."

"Perjury shall also be incurred by any person who, under the circumstances established in the preceeding paragraph, gives two or more testimonies, declarations, depositions or certifications which are irreconcilable with each other. In this case if shlla be unnecessary to establish the truth or falsehood of the facts involved."

"When a person who testifies incurs perjury, and said testimony results in the conviction and imprisonment of the accused, once this fact is established, it shall be deemed as aggravated perjury for the purpose of the punishment, which shall be imprisonment for a fixed term of nine (9) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of fifteen (15) years; if there should be extenuating circumstances, it may be reduced to a minimum of six (6) years."

The Independent Special Prosecuting Attorney, on the authority conferred on him by Act No.1 of January 18, 1985, submitted several complaints for violation of Section 225 in the District Court, Utuado Part, against the accused Angel L. Pérez Casillas, Jaime L. Quiles Hernández, Nelson González Pérez, Luis Juan Bruno González, William Colón Berríos, José Ríos Polanco, Nazario Mateo Espada and Carlos Santiago Borrero. The District Court dismissed the charges of perjury because they did not state offenses. It acted pursuant to the provisions of Rule 64 (a) of the Rules of Criminal Procedure. It appears from its written order that it based its judgment on the following grounds. Invoking the principle of speciality, as stated in Section 5 of the Penal Code, 33 L.P.R.A.[2]; *People v. Mena Peraza*, 113 D.P.R. 275 (1982), *People v. López Pérez*, 106 D.P.R. 584 (1977), it held that the special law contained in Sections 33 and 34 of the Political Code, 2 L.P.R.A. 153 and 154, is the one applicable in such cases where a witness commits perjury before a legislative body. Section 34 of the Political Code establishes that when a witness commits perjury in testifying before a legislative body he shall be punished in accordance with the penalties established in Section 33 of the Political Code.

It is provided therein that the person shall be guilty of a misdemeanor entailing a penalty of not more than $1,000 nor less than $100 or imprisonment in jail for not more than twelve months nor less than one month, or both penalties. In these cases the President of the Senate or the Speaker of the House shall certify a bill of facts which shall be delivered to the Secretary of Justice whose duty it shall be to file the pertinent charges before the Superior Court of Puerto Rico, San Juan Part. Having decided that in the present cases the Policital Code in the applicable law, it passed on to analyze the charges pursuant to the principle of legality sanctioned in Section 8 of the Penal Code, 33 L.P.R.A. 3031[3]. It decided

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[2]"If the same matter were foreseen by a special law or provision and by a law or provision of a general nature, the special law shall be applied unless it is otherwise established."

[3]"No penal action shall be prosecuted against any person for an act which is not expressly defined by law as an offense, and no punishments or security measures shall be imposed if not previously established therein".

that since Section 34 does not define the offense of perjury in a deposition before a legislative body, the State is precluded from instituting a penal action for facts occurred under such circumstances. (Page 5, Order of August 29, 1985).

By way of dictum, it added that Section 225 of the Penal Code typifies perjury committed before a "body", but does not define what it constitutes. It construed said term as excluding "legislative bodies".

The foregoing reasoning of the judge is based on his conception of the principle of restrictive construction of the penal statutes. He adduced that any doubt should be decided in favor of the defendants. He cited *Mari Bras v. Warden*, 100 D.P.R. 506 (1972); *Meléndez v. Superior Court*, 90 P.R.R. 639 (1964); *People v. Benítez*, 19 P.R.R. 235 (1913).

The Superior Court, Utuado Part, having issued a writ of certiorari, we agreed on reviewing directly by way of writ of certification. Rule 53.1c of the Rules of Civil Procedure. We hold that the accuseds may be prosecuted for the offense of perjury, as typified in Section 225 of the Penal Code of 1974.

I. PERJURY IN PUERTO RICO

With the enactment of the Penal Code of 1902 the offense of perjury was adopted. Section 117 established as an offense the conduct of a "person who having taken an oath that he will testify, declare, depose or certify truly before *any competent tribunal, officer or person* ... states as true any material fact which he knows to be false..." (Italica ours). (Revised Statutes and Codes of Puerto Rico 1902, page 496).[4]

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[4]Profesor Miró Cardona refers us to the sources of the offense:

h) In the Roman Law the two most important points with respect to the offense in issue are the XII *Tablas* and the *"Ley Cornelia de Falsis"*. The first one punished the 'false witness' with death, having him thrown from the Tarpeya rock. ('Si quis falsum testimonio dixesit sexo Tarpeio praeceps deijiciture'). The Law Cornelia de Falsis punishes any person who received money for failing to depose or doing it falsely. When perjury is committed in Homicide cases, the penalty was death: and in other cases the 'forfeiture of property' and 'deportation' of the guilty person was a free citizen. For the slave the inevitable penalty was death.

i) Henceforth, everywhere and in all the legislations, the witness had the obligation to give testimony under oath, as a religious duty of inexcusable compliance, the break of which gave the testimony a sacrile-

Act No. 41 of March 9, 1911, 33 L.P.R.A. 430, created an additional summary punishment to that one provided in the Penal Code of 1902 for the offense of perjury Amadeo, *El Poder de los Tribunales para Castigar por Desacato* (Power of the Courts to Punish Contempt) (1961) pp. 100-102. This offense known as contempt for perjury in open court, has remained in force, even after the enactment of the Penal Code of 1974. The statute provides as follows:

> "When during the trial of any case pending in the District or Superior Court of Puerto Rico, a witness shall appear and take an oath, or shall affirm that he will testify and depose truly before any such tribunal in any of the cases in which such an oath or affirmation may be administered, and after having taken such an oath or affirmation, shall wilfully, and contrary thereto, state as true any material matter which he knows to be false, or which he does not know to be true, is guilty of

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gious nature. This gave rise to two different and contradictory circumstances: (a) excessive strictness in the penalties, because the violation of the oath implied 'an offense to God, witness to his faithfulness in what he overred and pledged; but judge and ravenger of his infidelity, if he committed perjury; and (b) the immunity of the witness in falsifying the truth, when his testimony was given without previously taking the oath.

j) The evolution of the Procedure and of the assessed evidence system produced the conclusion that 'to falsify the truth' offends human and not divine Justice. The fact is punished but the offense of 'False Testimony' in which the oath of the witness lacks juridical value is established.

k) Both offenses have a common source: the need that truth be guaranteed. In 'Perjury' the fact is punished because it implies the break of the oath taken. In 'False Testimony' the fact is punished because truht is distorted.

1) The reason is obvious: The gibing of testimony in the modern penal procedure entails the nature that the giving is constrained and necessary, bound to the sovereign function of the Jurisdiction pertainig to the State, who can not take into consideration the religious convictions of the witness. Hence, the State has the right to request the deponent to give the true information of the facts which are probed at the Trial because they are known to him or because he was present when they occurred. For the State it is a necessary right, for the witness an undeniable obligation". Miró Cardona, Draft and Explanatory Notes to the Penal Code Bill. Drawn up by Francisco Pagán Rodríguez, 1972, pp. 366-368.

perjury; and when such an oath or affirmation is taken in open court, and is violated as herein provided, then said witness is guilty of contempt of court and shall be punished as hereinafter provided. If the judge presiding in said case shall be satisfied, in any case pending in his court, that a witness, after taking the oath, or after having affirmed, as prescribed by statute, to testify truly in any matter pending in the court, is guilty of perjury as herein defined, then it shall be the duty of said judge so trying the case, and he is hereby empowered on his own motion alone, to cause the arrest and detention of the party so offending, and he shall issue an order, to be served on the offending party, to appear and show cause why he sould not be punished for contempt of court. The defendant shall, within a time to be fixed by the court, make his defense to the citation, and the court shall hear the testimony adduced by the prosecution and the defense, and after hearing the testimony shall pronounce judgment in the case. If the court is satisfied from the depositions which must be taken in writing that the party so cited has been guilty of perjury, then it shall be the duty of the court to punish him as for contempt of court, and the punishment of such contempt shall be a fine not exceedingone hundred dollars, or imprisonment in the district jail not exceeding three months, or both such punishments, in the discretion of the judge trying the case. Any person so convicted in the District Court shall have a right to appeal to the Superior Court, as in other criminal cases; and in case the contempt is originally committed in the Superior Court, the party convicted in said Superior Court shall have the right to appeal to the Supreme Court.

The Summary nature and the intention of not substituting the offense defined in the Penal Code were established in Sections 2 and 3 of said Act, 33 *L.P.R.A.*, 431-32[5]. See in this respect the analysis of Professor Amadeo,

[5]"The power given herein to the judge of any court to punish as for a contempt any perjury committed in open court is not to be understood as taking away from the courts the power and authority to punish for

ante pp. 100-102; *People v. Aquino*, 33 P.R.R. 247 (1924); *People v. Fourquet*, 17 P.R.R. 1037 (1911). Notwithstanding the summary nature of this offense, the guilt of the defendant must be proved beyond any reasonable doubt and the witness must be givent he opportunity to be informed of the charges and present his defenses. *People v. Ortiz Padilla*, 102 D.P.R. 736 (1974); *People v. Marrero Méndez*, 95 P.R.R. 594 (1967); *People v. Marchany*, 61 P.R.R. 676 (1943).

In conclusion, when perjury is committed in open court, the perjured witness may be prosecuted under the 1911 Act, 33 L.P.R.A. 430, 431 or under Section 117 of the Penal Code of 1902. We have never held that the special law of 1911 substituted the provisions of the Penal Code[6]. Such is the state of law as to perjury committed in the courts of justice.

Insofar as the legislative branch is concerned, Sections 33 and 34 of the Political Code of 1902 provided as follows:

> Sec. 33 - If any witness neglects or refuses to obey such subpoena or appearing neglects or refuses to testify the Executive Council or House of Delegates may, by resolution entered on the journal, commit him for contempt.
>
> Sec. 34 - Any witness neglecting or refusing to attend in obedience to subpoena may be arrested by the sergeant-at-arms and brough before the Executive Council or House of Delegates. The only warrant or authority necessary to authorize such arrest is a copy of a resolution of the Council or House signed by the President of the Council or Speaker of the House of Delegates and countersigned by the respective clerk".

Act. No. 100 of June 23, 1955 amended said Sections and added Sec. 34-A, 2 L.P.R.A. 153, 154 and 154 a. The lawmker established a proceeding to punish any person who committed perjury in a testimony given before a legislative body. 2 L.P.R.A. 154, par. 2. Likewise, when the summary

perjury as provided by other statutes and laws of Puerto Rico; but this is intended as a summary manner of dealing with cases of perjury committed in open court where the falsity of the testimony is apparent to the judge of the court".

[6]Quaere whether he may be prosecuted under both provisions. See footnote 15, p. 100, Amadeo, *SUPRA*.

proceeding of the Act of 1911, 33 L.P.R.A. is followed, if the proceeding established in Sec. 34, *SUPRA* was instituted, the penalties were the same as for a misdemeanor, Sec. 33, *SUPRA*.

Subsequently, the reform of the Penal Code was initiated culminating in the enactment of a new legal body in 1974. The Bill for the Penal Code of 1967 treated the offense of perjury in the following manner: (Bill for the Penal Code for Puerto Rico, Equity, ed. 1967, pp. 97 and 98).

Sec. 283 - Perjury (Oath)

Any person who having taken an oath to testify, declare, depose or certify truly before any competent court, official or person in any of the cases in which such and oath may be administered by law, states as true any essential fact, which he knows to be false, or makes an unqualified statement of an essential fact which he does not know to be true, shall be punished by imprisonment up to four years.

Perjury, shall also be incurred by any person who under the circumstances established in the preceeding paragraph, gives two or more testimonies, declarations, depositions or certifications which are irreconcilable with each other. In this case it shall be unnecessary to establish the truth or falsehood of the facts involved.

Sec. 284 - Form and Definition of Oath

The world oath used in the preceding section comprises an affirmation as well as any other form of confirming what is stated.

No special form of oath or affirmation shall be required. The form which the witness believes to be most obligatory or solemn shall be used.

Sec. 285 - Inadmissible Defenses

It is no defense in any action for perjury:

(a) That the oath was taken or administered in an irregular manner

(b) The fact that the accused was not competent to give testimony, deposition or certification.

(c) The fact that the accused did not know the materiality of the false statement made by him, or that it did not in fact affect the proceeding in which it was made.

It should be noted that in this Bill, of which Dr. Francisco Pagán Rodríguez, was in charge, the definition of perjury, the aforesaid of Sec. 117 of the Penal Code of 1902, was kept substantially the same.

It is in the Bill of 1974 that the term "body" was included in the definition of the offense. As we have seen, since 1955 the legislator had included the word or term "legislative body" upon referring to perjury before the Legislative Assembly in par. 2 of Sec. 34 of the Political Code.

The Executive Director of the Council for the Justice Reform, Mr. Antonio Negrón García, upon appearing before the Juridical Committee of the House of Representatives, at a public hearing held June 12, 1974, stated the following:

"...The statute substantially adopts the definition of said offense offered by Section 117 of the Penal Code in force. However I wish to point out the following characteristics, not only *is the offense of perjury extended to any person who has taken the oath to state the truth before the courts but it extends the situation to any body; it being understood by body any type of institution which in the light of the evaluation of the modern Administrative Law, has legislative, quasi-legislative or quasi-adjudicatory functions*... (Italics ours)

If we take into consideration that the deponent and the lawmakers already knew that the legislative committees were included in par. 2 of Sec. 34 within the concept of "legislative body" we are constrained to conclude that in the definition and explanation of the term "body" the Senate and the House Committees were included. It would be absurd to extend the term only to classical bodies, recognized in the Administrative Law and to exclude those which have the legislative function per excellence, to wit, the Senate, the House of Representatives and the Municipal Assemblies.

We have consistently recognized the very ample powers of the Legislature and its Committees *Hernández Agosto v. Ortiz Montes, et. al*, decided June 29, 1984; 84 *J.T.S.* 84; *Romero Barceló v. Hernández Agosto*, decided May 1, 1984, 84 *J.T.S.* 35; *Peña Clos v. Cartagena Ortiz*, 114 *D.P.R.* 576

(1983). We would be guilty of acting inconsistently and we would be rendering a weak service to the separation of powers, if we adopted the highly restrictive interpretation of the District Court, Utuado Part, and of the defendants. Instead of recognizing the legislative powers, we would be seriously curtailing and limiting its powers if we gave a different treatment to witnesses who testify under oath before a legislative body and to those who testify in a judicial proceedinng or at a hearing before an administrative agency. There is no valid or logical reason for such classification. On the contrary, it would be illogical to reach the proposed result. Furthermore, we would be disregarding, by judicial fiat, the clear legislative intent upon enacting Section 225 of the Penal Code of 1974. The interpretation we adopt complies with the principles of legality contained in Section 8 of the Penal Code, 33 L.P.R.A. 3031.

We hold that to testify before a legislative committee on the truth of an essential fact, knowing it to be false, constitutes perjury punishable under Section 225 of the Penal Code in force.

II. PRINCIPLE OF SPECIALITY

In dismissing the charges the magistrate assigned to the District Court, Utuado Part, relied on Section 5 of the Penal Code, 33 L.P.R.A. 3005, which reads:

> The provisions of this subtitle shall also be applicable to facts foreseen by special criminal laws. If the same matter were foreseen by a special law or provision and by a law or provision of a general nature, the special law shall be applied, unless it is otherwise established.
>
> Until the special criminal laws are amended pursuant to the fixed sentence system, the felonies stipulated therein shall entail imprisonment for a fixed term equal to three fifths of the maximum term established for the offense. Should there be aggravating circumstances, this penalty may be increased to the maximum of the established penalty; if there should be extenauting circumstances, it may be reduced to two fifths of the maximum penalty established for the offense.

The Court held that the Political Code is the special law applicable in the cases of perjury before a legislative body

and since the Penal Code has not repealed Section 33 and 34 of the Political Code, ante, it is solely under the provisions that the charges in this case were preferred. It erred.

In principle, the constitutional duty to comply with the laws and see that they are complied with its incumbent on the executive power. Constitution of the Commonwealth of Puerto Rico, Art. IV Sec. 4: "As a rule, the appearance and representation of the State behoover the Secretary of Justice. The latter, directly or through his prosecuting attorneys, has the commitment and representation of the State in all criminal cases". *People v. González Malavé*, 85 *J.T.S.* 58, p. 4049.

As an exception to this general rule, Section 34 of the Political Code, 2 L.P.R.A. 154, establishes a proceeding to institute a criminal prosecution against any witness who wilfully refuses to declare, appear, produce any document requested, or who commits perjury in testifying before the Legislative Assembly, any of the House, or any committee, subcommittee or commission, with respect to any matter under its investigation.

It is the purpose of these provisions to protect the inherent power of the Legislative Branch to carry out investigations which may serve as basis for future legislation, an inseparable power of lawmaking, *Peña Clos v. Cartagena Ortiz*, 83 J.T.S. 83, p. 3297 and to exercise its duties "to inquire into the government, to debate matters of general interest and to inform the country on how public affairs stand", *Romero Barceló v. Hernández Agosto*, 84 J.T.S. 35, p. 3569, powers not subordinated to lawmaking. Ibid. In *McGrain v. Daughtery*, 273 U.S. (1927), it was held by the Supreme Court of the United States that even in the absence of applicable legislation, the legislative body had inherent power to summon and compel the appearance of a witness through the power of contempt when his testimony is pertinent in a valid legislative investigation. This power is necessary in order that the legislative body may duly discharge its functions of investigation, for in order to obtain the necessary information, it must have the power to summon witnesses, to compel their appearance and testimony and to be able to grant immunity and to use the coercive process of contempt to compel hostile witnesses when they refuse to testify

alleging their right of self-incrimination. This legislative power is statutorily recognized in the Political Code, Sections 31 to 35 (2 L.P.R.A., Sections 151 to 155).

The purpose of these provisions is to create a proceeding by virtue of which the legislative bodies may initiate a contempt proceeding against a hostile witness without it being necessary to depend on whether the Executive Branch decides or not to bring the action. Once the proceeding is instituted, it is the duty of the Secretary of Justice, not discretionary, to appear before the Superior Court, San Juan Part, to file criminal action for noncompliance with the order or to invoke the Court's civil contempt power to enforce its orders.[7] Section 154 and 154 (a) SUPRA.

These statutes comply with the constitutional purpose of promoting the adequate balance and equilibrium among the three government branches by means of the check and balance system in order to avoid the undue accumulation of powers in a single branch.[8] The appointment of an Independent Prosecuting Attorney, who does not depend on the Executive Power, so that he may carry out the investigation and initiate criminal prosecutions against those officers who may have violated the law responds to that vision.

The provisions of the Political Code comply with this purpose of independence of judgment in the legislative power of investigating without the need of executive discretion to compel a witness to testify. The power to obtain information is useless unless it is coupled with the requirement that the truth must be told. It is for this purpose that Section 34 also provides for a proceeding where the legislative bodies may request the Secretary of Justice to file perjury charges against witnesses who have testified before the legislative bodies. This section only provides a different proceeding by virtue of which the legislative bodies may bring an action for perjury without depending on the executive discretion.

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[7]Although Sec. 34, 2 L.P.R.A., SEc. 154 imposes on the Legislative Body the duty to certify to the Secretary of Justice a bill of the facts in case of noncompliance or perjury by a witness who has been subpoenoed, it should be understood that with respect to the Legislative Power it is discretionary to present the certification to the Secretary of Justice. See *Wilson v. United States*, 369 F 2d. 198 (D.C. 1966).

[8]See *Banco Popular v. Superior Court*, 63 P.R.R. 63, 68-69, (1944).

The act imposes on the Secretary a ministerial duty to file charges once the proceeding has been complied with and its compliance may be enforced through mandamus. The existence of this special proceeding aimed to attach a specific evil, in no way affects the constitutional power of the Executive Branch to see to the enforcement of the laws. The fact that the Legislature refuses to prosecute a witness who has committed perjury when testifying before one of its bodies does not preclude the Executive Power from its duty and authority to prosecute any person committing a public offense. We decide that the offense of perjury, Section 225 of the Penal Code, is the substantive law which applies to proceedings initiated by the legislative bodies pursuant to the provisions of the Political Code as well as to charges filed by the Executive Branch. In our criminal justice system, the Executive Power has an ample discretion to prosecute and it cannot depend on whether another government branch wishes or not to file charges for the commission of a public offense.

The Independent Special Prosecuting Attorney may, therefore, initiate criminal prosecutions under Section 225 of the Penal Code without need of complying with the provisions of the Political Code, which is only applicable where it is the Legislative Branch that initiates the proceedings for contempt or perjury.

The proceeding prescribed in the Political Code was meant to buttress the Legislative Power in the possible event of inaction on the part of the Executive Power, but not to render powerless the Executive Branch in the possible event of inaction on the part of the Legislative Power. This interpretation strengthens the separation of powers and creates an adequate balance between the Executive and the Legislative Powers. In this particular case, the Legislature, through S.B. 13, approved and signed by the Governor into law on January 18, 1985, expressly conferred on the Independent Special Prosecuting Attorney the power to initiate and conduct all the corresponding proceedings to prosecute public officers involved in improper or unlawful conduct in relation to the investigation of the Cerro Maravilla events. The Independent Special Prosecuting Attorney was given exclusive jurisdiction to investigate and institute penal, civil, ad-

ministrative and of professional conduct actions against these officers.

The allegations that the principle of speciality requires that the proceeding established in the Political Code must always be followed is incorrect, for it only applies when it is the Legislative Branch the one that institutes criminal actions for perjury. In order that the principle of speciality be applicable it is necessary that there exist two laws regulating the same matter in apparent conflict. "In such cases *where an express legislative provision of a general character does not exist*, the conflict is settled by the special law regime, which establishes that under circumstances of this nature, the special provision should be applied". *People v. López Pérez*, 106 D.P.R. 584, 586 (1977). (Emphasis Supplied). The speciality principle is a rule to construe the legislative intent.

In this case, as we have previously indicated, the law which created the office of Independent Special Prosecuting Attorney expressly authorized him to institute and conduct all the criminal actions against public officers with respect to the investigation and events in Cerro Maravilla. Even in the absence of this express legislative intent, the principle of speciality would not be applicable as when "two laws or two legal provisions hold the relation of general and special where the requirements of the general type are all contained in the special, in which other qualified conditions are also present by virtue of which the special law has priority over the general law in its application". T. Jiménez de Asúa, "La Ley y el Delito", 12th ed., Buenos Aires *Editorial Sudamericana*, 1981, p. 146. As we have seen, Section 34 of the Political Code is not a substantial special penal law that typifies an offense differnet from the perjury established in Section 225 of the Penal Code, Section 34 of the Political Code merely provides an independent mechanism by virtue of which the Legislative Branch may institute criminal actions for the offense of perjury. That is why Section 34 of the Political Code does not define the offense of perjury since it is defined in the Penal Code, Section 225.

In bried, we do not have here the coexistence of a general and of a special offense applicable to one some punishable action where the special offense contains additional ele-

ments not included in the general law, which requires the application of the special law. Cf. *People v. Mena Peraza*, 113 D.P.R. 275 (1982); *People v. López Pérez, SUPRA*. Here the offense of perjury established in Section 225 of the Penal Code is the only applicable one. It repealed the misdemeanor contained in Section 33 of the Political Code. However, we repeat, it did not affect the proceeding provided in Section 34.

III

The allegation that the Independent Special Prosecuting Attorney lacks power to file actions for perjury is clearly without merit. It is based on the erroneous premise, alredady rejected, that the charges could only be brough under Sections 33 and 34 of the Political Code.

Finally, none of the defendants has placed us in a position to pass judgment on the allegation that Section 35 of the Political Code, 2 L.P.R.A. 155, is unconstitutional because it does not grant absolute immunity. It does not appear from the record that, as a prior condition to testify, such immunity or a derivative was requested.

The presumption of validity of the statute has not been overcome, nor have it been shown that the constitutional provision of protection against self-incrimination was violated, *Batalla v. District Court*, 74 P.R.R. 266 (1953). The protection does not cover perjured testimony *U.S. v. Apfelbaum*, 445 U.S. 115, 63 L. ed. 2d. 250, 100 S. Ct. 948 (1980).

CONCLUSION

For the reasons stated judgment shall be entered reversing the Order of the District Court, Utuado Part, of August 29, 1985 and the cases shall be remanded to said court for continuation of the proceedings.

(s)_____

Peter Ortiz
Associate Justice

APPENDIX A-20
IN THE SUPREME COURT OF PUERTO RICO

CE 85-566

THE PEOPLE OF PUERTO RICO,
PLAINTIFF-PETITIONER

vs.

ANGEL L. PEREZ CASILLAS
NELSON GONZALEZ PEREZ
JAIME QUILES HERNANDEZ
RAFAEL MORENO MORALES
JUAN BRUNO GONZALEZ
RAFAEL TORRES MARRERO
JOSE RIOS POLANCO
NAZARIO MATEO ESPADA
CARLOS SANTIAGO BORRERO
WILLIAM COLON BERRIOS
DEFENDANTS-RESPONDENTS

CERTIFICATION

JUDGEMENT
SAN JUAN, PUERTO RICO, MAY 22, 1986

TO THE HONORABLE COURT:

For the reasons stated in the foregoing opinion, the Order of the District Court, Utuado Part, of August 29, 195 is hereby reversed and the case is remanded to said Court for the continuation of the proceedings.

It was so decreed and ordered by the Court as certified by the Acting General Secretary. Mrs. Justice Naveira Rodón did not participate.

HERIBERTO PEREZ RUIZ
Acting General Secretary
Signed

APPENDIX B

IN THE DISTRICT COURT OF PUERTO RICO
UTUADO PART

THE PEOPLE OF PUERTO RICO

vs.

ANGEL L. PEREZ CASILLAS
NELSON GONZALEZ PEREZ
JAIME QUILES HERNANDEZ
RAFAEL MORENO MORALES
JUAN BRUNO GONZALEZ
RAFAEL TORRES MARRERO
JOSE RIOS POLANCO
NAZARIO MATEO ESPADA
CARLOS SANTIAGO BORRERO
WILLIAM COLON BERRIOS

DEFENDANTS

CRIM. NOS. VP 84-343 to
VP 84-371
VP 85-148

FIRST DEGREE MURDERS, PERJURY

RESOLUTION

Several charges of perjury were filed against the above-entitled defendants under Article 225 of the Penal Code; 33 LPRA 4421, allegedly committed during the legislative investigation carried out by the Judicial Committee of the Senate of Puerto Rico, of the events which took place in Cerro Maravilla.

The defendants request the dismissed of such charges for lack of jurisdiction of the District Court, Utuado Part, mainly on the ground that the special law —the Political Code— is the one establishing the procedure for this criminal conduct and not the Penal Code.

The Independent Special Prosecutor maintains that the Penal Code repealed Article 34, Subd. 2 of the Political Code; 2 LPRA 154, and, if this were not so, that Article 225 of the Penal Code typifies this criminal conduct, for which reason it has authority, under the principle of concurrence of offense, to file the charges under said section.

The parties having submitted to our jurisdiction, we hold that the dismissal of the charges for perjury lies inasmuch as they do not constitute an offense for the following reasons.

I

PRINCIPLES OF JURISDICTION

Before entering into any analysis, we must first determine whether the dismissal of the perjury cases lies for "lack of jurisdiction" of the District Court, Utuado Part, and whether it has jurisdiction to decide on the merits the questions of law submitted by the parties.

The Constitution of the Commonwealth of Puerto Rico in its Article V, Section 2; 1 LPRA and the Judicial Act in its Section 10; 4 LPRA 62 establish the unified judicial system in our jurisdiction which determines that when an information or complaint is filed in a court without jurisdiction the case shall not be dismissed on the ground of lack of jurisdiction but it shall be transferred to the division or part of the court of proper venue. *People v. Superior Court*, 84 P.R.R. 135, 140 (1961). In the perjury cases before us under the aforesaid principle, by agreement of the parties and consent of the Court, the cases were transferred from the Superior Court, San Juan Part, to the Superior Court, Utuado Part. The defendants and the Independent Special Prosecutor submit their arguments to our consideration with respect to whether Article 33, 34 of the Political Code or Article 225 of the Penal are applicable to the present cases. For which reason, pursuant to the unified judicial system and with the consent of the parties, the Court assumes jurisdiction and decides the questions of law raised. *People v. De Jesús Gómez*, 100 P.R.R. 628, 632 (1972).

II

SPECIALTY PRINCIPLE

The special law is defined as one which refers exclusively to juridical relations and includes the typification of offenses and precedural regulation for its implementation. Law of XII Tablas, *Nueva Enciclopedia Jurídica*, Vol. XV, 1974, p. 1976.

Before analyzing our legal provisions with respect to the specialty principles, we must point out that in the civil-law tradition when problems of concurrence or conflict of laws are studied —specialty being one of its classifications among the hierarchical relations— it is analyzed as "apparent conflict of penal provisions". The world apparent is used "because the judicial systems offers, either expressly or implicitly, the tests for determining the applicability of one or another penal provision in each concrete case". Luis Jiménez de Asúa, *Tratado de Derecho Penal*, Vol. II, Second Ed. 1950, p. 535.

In our jurisdiction, the principles of application and specialty of the penal laws establish that if the same matter "were foreseen by a law or special provision and by a law or provision of a general character, the special law should be applied when the opposite is not established". Section 5, Penal Code, 1974; 33 LPRA 3005; *People v. López Pérez, 106 DPR 584, 586 (1977)—. The aforesaid Code establishes in Section 280; 33 LPRA 4624, as a principle of application of the existing special laws, at the time of approval of the Code that: "The inclusion in this Code of some crimes or provisions prescribed in special laws does not imply the repeal of those laws nor of those special crimes not incorporated in this code".*

The Legislative Assembly in Articles 33 and 34 of the Political Code determines that in cases where a witness commits perjury before a legislative body, the corresponding charges for perjury shall be filed in the Superior Court, San Juan Part, classifying the offense under such circumstanmces as a misdemeanor and fixing the penalty to be imposed in case of conviction.

From the preceeding we conclude that the Political Code is the special law applicable in the perjury cases before our

consideration and that the Penal Code has not repealed this special law, but, on the contrary, has "expressly" left it in force, for which reason it is pursuant to said legal provisions tha the charges before our consideration mustr be filed.

III

PRINCIPLE OF LEGALITY AND STRICT CONSTRUCTION

Once it has been decided that in the present perjury cases the applicable law in the Political Code, we must analyze this law in the light of the different principles of the penal law of hermeneutics. The legality principle establishes that, "no one shall be punished for an act not expressly provided as punishable by law...and the analogy of offenses is barred". Luis Jiménez de Asúa, La Ley y el Delito, Chapter X, Thirteenth Ed., 1984, p. 96.

Our Penal Code, in its Section 8; 33 LPRA 3031, sanctions the aforesaid principle of legality, prohibitory the State to prosecute any "penal action...against any person for an act which is not expressly defined by law...", and also prohibits that crimes be created by analogy. It is a well-settled rule in our Supreme Court that in our jurisdiction there only exist the crimes defined by law. *People v. Lucret Quiñones,* 111 DPR 716, 738 (1981) (cases cited).

From a study of Articles 33, 34 of the Political Code, we conclude that they do not define the offense of perjury before a legislative body, although what does constitute an offense is the failure to appear or refure to answer before a legislative body.[1] We conclude under the principle of legality —as do the parties in their briefs— that Articles 33 and 34 of the Political Code do not define what constitutes the offense of perjury before a legislative body for which reason the State

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[1]Upon examining the legislative history of said sections, we do not find any expression on the part of the members of the Legislative Assembly when they were discussed. See Journal of Sessions, *House* H.B. 1375, April 21, 1955, pp. 1338-1340 and 1386-1387. *Senate* H.B. 1375, May 26, 1955, pp. 2173-2174. We must point out that the Senate Judicial Committee used Sections 33 and 34 of the Political Code as source of substantive law upon requesting the appearance of witnesses during the investigation which gives rise to the present cases.

is barred from prosecuting any penal action for acts which took place under such circumstances.

Notwithstanding our decision that the applicable law herein is the Political Code let us analyze the provisions defining the offense of perjury in the Penal Code under the principle of penal hermeneutics. In our jurisdiction Section 6 of the Penal Code, 33 LPR 3021 and the case law define the principle of strict construction of the penal laws. This principle establishes as a rule of penal hermeneutics that no penal law shall be construed by deduction and that any doubt shall be settled in favor of the defendants *Mari Bras v. Warden*, 100 P.R.R. 504, 514; *People v. Benítez*, 19 P.R.R. 235, 250 (1913)[2].

Under this principle it is established that every offense must be clearly defined by law and that the construction thereof must not be forced, nor words interpolated or omissiones supplied *Meléndez v. Superior Court*, 90 P.R.R. 639, 642 (1964).

Article 225 of the Penal Code typifies perjury committed before a "body" but does not define what it constitute.[3]. We do not find any expression in the legislative history that, even considering the intention and objectives of the section, would not lead us to conclude that the definition of "body" included "legislative body". *People v. Superior Court*, 101 D.P.R. 439, 442 (1973).

In fact, the Independent Special Prosecutor, in his motion of opposition includes a quotation where the Executive Director of the Council for Judicial Reform stated, upon discussing the House Bill for the Penal Code, that the term body includes any type of institution which in the light of the development of the Administrative Law has legislative or quasi-legislative powers. We believe that using the widest test possible allowed by the aforesaid principles of penal hermeneutics we cannot conclude that this definition of "body" includes "legislative bodies".

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[2]As to the 1974 Penal Code and the effectiveness of strict construction of the penal laws see, Dora Nevarez Muñiz, *Derecho Penal Puertorriqueño*, General Part, 1983, pp. 102-108.

[3]The charges are files under the typification of body, inasmuch as the other circumstances typified in Article 225 do not apply in the situation of facts before our consideration.

On the other hand, we note that the Penal Code in Chapter 279, 33 LPRA 4471-4475 where the "Crimes Against Legislative Power" are established, the legislator does not define perjury before a legislative body, as a crime even though he does define several criminal acts against the legislative power.

We conclude, under the principle of strict construction of the penal laws that the Penal Code, if it were applicable, does not define the offense of perjury before a legislative body, for which reason the State is barred from prosecuting an action against any person for conduct which may be inferred or implied as perjury committed before a legislative body.

For the reasons stated, the above-entitled charges of perjury shall be dismissed since they do not constitute an offense. Rule 64 (a) of the Rules of Criminal Procedure, 1963.

Be it registered and notified.

Given in Utuado from the Central Mountain Range of the island of Puerto Rico, on this 29th day of August, 1986.

JOSE L. MIRANDA DE HOSTOS
District Judge

I attest: Having notified this Resolution to:

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Independent Special Prosecutor
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Hato Rey, Puerto Rico 00919

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Sociedad para Asistencia Legal
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In Bayamón for Utuado, Puerto Rico, August 29, 1986.

Minerva Rodríguez Pérez
Secretary

APPENDIX C

§ 153. Penalty for failure to comply

Any person who having been subpoenaed to testify as witness, or to produce documents, or both, as provided in section 151 of this title, in any matter under investigation before the Legislative Assembly, before either House, or before a joint committee or joint subcommittee, or before any committee or subcommittee or either House, wilfully fails to appear, or who having appeared refuses to answer any question pertinent to the matter under investigation, or refuses to produce any document required of him, shall be guilty of a misdemeanor entailing a penalty of not more than one thousand (1,000) dollars nor less than one hundred (100) dollars, or imprisonment in jail for not more than twelve (12) months nor less than one (1) month, or both penalties. —Political Code, 1902, § 33; Const., art. II, § 1; June 23, 1955, No. 100, p. 526, § 1, eff. June 23, 1955.

§ 154 —Certification of failure to comply; filing of charges; perjury

(1) When a witness subpoenaed under sections 151 and 152 of this title fails to appear to testify or to produce the books, papers, records or documents, as required of him, or when a witness so subpoenaed refuses to answer any question relevant to the matter under investigation before the Legislative Assembly, or before either House or before a joint committee or joint subcommittee of both bodies, or before any committee or subcommittee or either House, such facts shall be reported to the presiding officer or vice-presiding officer of the proper House and it shall be the duty of the President or Vice-President of the Senate or of the Speaker or Vice-Speaker of the House, as the case may be, to certify, and said officers shall certify, a bill setting forth the facts, which certification shall be signed by the President or Vice-President of the proper House and issued under the seal of the House or of the Senate, as the case may be, and shall be delivered to the Secretary of Justice, whose duty it shall be to file the pertinent charges before the Superior Court of Puerto Rico, San Juan Part.

(2) The same procedure shall be followed in the case of

a witness who commits perjury in testifying before a legislative body, and upon conviction, such witness shall be punished in accordance with the penalties established in section 153 of this title. —Political Code, 1902, § 34; Const., art. III, § 1; June 23, 1955, No. 100, p. 526, § 1, eff. June 23, 1955.

APPENDIX D

§ 4421. Perjury

Every person who, having taken an oath that he will testify, declare, depose or certify truly before any competent court, body, official or person, in any of the cases or proceedings in which such an oath may be administered by law, states as true any essential fact which he knows to be false or makes an unqualified statement of an essential fact which he does not know to be true, shall be punished by imprisonment for a fixed term of six (6) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of ten (10) years; if there should be extenuating circumstances, it may be reduced to a minimum of four (4) years.

Perjury shall also be incurred, by any person who, under the circumstances established in the preceding paragraph, gives two or more testimonies, declarations, depositions or certifications which are irreconcilable with each other. In this case, it shall be unnecessary to establish the truth or falsehood of the facts involved.

When a peson who testifies incurs perjury, and said testimony results in the conviction and imprisonment of the accused, once this fact is established, it shall be deemed as aggravated perjury for the purpose of the punishment, which shall be imprisonment for a fixed term of nine (9) years. Shoud there be aggravating circumstances, the fixed penalty established may be increased to a maximum of fifteen (15) years; if there should be extenuating circumstances, it may be reduced to a minimum of six (6) years. —Penal Code, 1974, § 225; amended June 4, 1980, No. 101, p. 279, § 1.

APPENDIX E

IN THE SUPREME COURT OF PUERTO RICO
THE PEOPLE OF PUERTO RICO,
Plaintiff - Petitioner
Appellee
v.

Nelson González Pérez
Angel L. Pérez Casillas
Jaime Quiles Hernández
Rafael Moreno Morales
Juan Bruno González
Rafael Torres Marrero
José Ríos Polanco
Nazario Mateo Espada
Carlos Santiago Borrero
William Colón Berríos
Defendants - Respondents
Appellants

CE 85-566

CERTIFICATION

NOTICE OF APPEAL

TO THE HONORABLE COURT:

Pursuant to Rule 10 of the Rules of the United States Supreme Court the Defendants-Respondents Appellants Nelson González Pérez, Angel L. Pérez Casillas, Jaime Quiles Hernández, Rafael Moreno Morales, Rafael Torres Marrero, Juan Bruno González, William Colón Berríos, José Ríos Polanco, Nazario Mateo Espada, and Carlos Santiago Borrero state and alleges:

1. That Nelson González Pérez, Angel L. Pérez Casillas, Jaime Quiles Hernández, Rafael Moreno Morales, Rafael Torres Marrero, Juan Bruno González, William Colón

Berríos, José Ríos Polanco, Nazario Mateo Espada and Carlos Santiago Borrero are the apellants herein.

2. That appellants appeal from the judgment rendered on May 22, 1986, by this Court in which it decides that appellants shall be accused under the provisions of Section 225 of the Penal Code of Puerto Rico, 33 LPRA Sec. 4421, instead of being accused under the provisions of Sections 33 and 34 of the Political Code, 2 LPRA 153 and 154.

3. The appellants jurisdiction of the Supreme Court of the United States falls within Section 1258 of Title 28 of the U.S. Code.

4. That the appeal is based on the ground that if appellants are accused under the provisions of Section 225 of the Penal Code of Puerto Rico their rights would be infringed under the Fourth, Fifth, Eighth and Fourthteenth Amendments of the Constitution of the United States. Appellants further allege that the decision appealed from deprives them of the right granted under Section 19 of Article Two of the Bill of Rights of the Commonwealth Constitution, Title 1 LPRA, guaranteed by the Fifth Amendment of the Constitution of the United States of America.

At San Juan, Puerto Rico, on June 25, 1986.

RESPECTFULLY SUBMITTED,
MIGUEL A. COCHRAN ACOSTA
TEODORO MENDEZ LEBRON
RAFAEL J. BARAGAÑO AMADEO
EDUARDO CABALLERO REYES
FRANCISCO ALBIZU MERCED
JORGE BATLLE OJEDA
FELIX A. TORO
CARLOS ORTIZ SANTIAGO
JUAN LUGO OJEDA
(Signed by)
BY: (S)
WILLIAM MARINI ROMAN
Box 9134
Santurce Station
Santurce, P.R. 00907
Tel. 728-1580

I, William Marini Roman, of legal age, single, attorney-at-law and resident of San Juan, Puerto Rico, declare under oath that on this same date I have sent, by mail, a copy of the foregoing notice of appeal, to the Honorable Attorney General, Department of Justice, Box 192, San Juan, Puerto Rico and to the Independent Special Prosecuting Attorney, at his address in the record.

(Signed by)
(S) WILLIAM MARINI ROMAN

AFFIDAVIT NO. 560

SWORN to and subscribed before me by William Marini Román, of the aforesaid personal circumstances whom I know personally, to which I attest, at San Juan, Puerto Rico, on June 25, 1986.

(Signed by Freddie Vega-Torres, Esq.)
(S) NOTARY PUBLIC

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-654

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NELSON GONZALEZ PEREZ, *et al.*,

Appellants,

VS.

THE PEOPLE OF PUERTO RICO,

Appellees.

MOTION TO DISMISS

ALEJANDRO SALGADO RIVERA
Independent Special Prosecutor
Commonwealth of Puerto Rico

Baldorioty 703
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Attorneys for Appellees

November 19, 1986

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Whether this Honorable Court has jurisdiction, to review the judgment of the Supreme Court of Puerto Rico issued in this case, either on appeal or certiorari, when:

1. The alleged federal question raised by appellants was not properly or timely presented before the Supreme Court of Puerto Rico and was not addressed by that court, since it was raised for the first time in the Jurisdictional Statement filed in this Court.

2. The judgment appealed from is not a "final judgment" under 28 U.S.C. 1258 since it is an interlocutory decision on a question of Puerto Rican law which requires the further proceedings in the case, including a *trial on the merits*, to go forward.

3. The question presented by appellants that the construction by the Supreme Court of Puerto Rico of the local perjury statute to include "legislative bodies" in the word "body" contained in the text, violates the Due Process and Ex Post Facto Clauses of the Constitution is not a substantial federal question.

PARTIES TO PROCEEDINGS BELOW

The parties before the Supreme Court of Puerto Rico: (1) Nelson González Pérez, Angel Pérez Casillas, Jaime Quiles Hernández, Rafael Moreno Morales, Juan Bruno González, Rafael Torres Marrero, José Ríos Polanco, Nazario Mateo Espada, Carlos Santiago Borrero and William Colón Berríos, appellants herein (2) the People of Puerto Rico, represented by the office of the Independent Special Prosecutor, appellee herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-654

NELSON GONZALEZ PEREZ, *et al.*,

Appellants,

VS.

THE PEOPLE OF PUERTO RICO,

Appellees.

MOTION TO DISMISS

Pursuant to Rule 16.1 the appellee, the People of Puerto Rico moves to dismiss the appeal filed by appellants for lack of jurisdiction of this Court to review the judgment of the Supreme Court of Puerto Rico.

COMMONWEALTH STATUTORY PROVISIONS INVOLVED

Articles 33 and 34 of the Political Code, 2 L.P.R.A. 153 and 154, as amended in 1955, provide that in case any person fails to appear or testify before a Committee of the Commonwealth Legislature he shall be guilty of a misdemeanor entailing a penalty of not more than one thousand ($1,000) dollars or imprisonment in jail for not more than twelve (12) months. When such an event occurs Article 34 requires that

the President of the Senate or the Speaker of the House certify the facts to the Secretary of Justice "whose duty it shall be to file the pertinent charges before the Superior Court of Puerto Rico." Article 34(2) declares that the "same procedure shall be followed" in case of a perjured witness before the Legislature or its Committees and that upon conviction shall be subject to the penalties specified in article 33.

Section 225 of the Puerto Rico Penal Code of *1974*, 33 L.P.R.A. 4421 *defines* the offense of perjury and establishes the penalties. It provides that "every person who having taken an oath that he will testify, declare, depose or certify truly before any competent court, *body*, official or person, in any of the cases or proceedings in which such an oath may be administered by law, states as true any essential fact which he knows to be false or makes an unqualified statement of an essential fact which he does not know to be true, shall be punished by imprisonment for a fixed term of six (6) years. Perjury shall also be incurred, by any person who, under the circumstances established in the preceding paragraph, gives two or more testimonies, declarations, depositions or certifications which are irreconcilable with each other. In this case, it shall be unnecessary to establish the truth or falsehood of the facts involved."

The Supreme Court of Puerto Rico interpreted the word "body" in the quoted text to include "legislatives bodies" thereby making possible appellants prosecution under Section 225 of the Penal Code.

STATEMENT OF THE CASE

The appeal docketed herein is the latest salvo in a prolonged legal battle, stemming from the assassi-

nation by Puerto Rican police on July 25, 1978 of two young advocates of independence for Puerto Rico.[1] The events occurred on a remote mountain in rural Puerto Rico, Cerro Maravilla, where the deceased were led by an undercover agent of the Puerto Rico police, presumably, to commit acts of terrorism.

The Governor of Puerto Rico in 1978, Carlos Romero Barceló promptly labeled the policemen present at Cerro Maravilla "heroes" and two quick, successive "probes" by the Puerto Rico Department of Justice absolved them of all responsibility and held that they acted in self-defense. Two equally incomplete investigations by the United States Department of Justice reached the same results.

Unconvinced by the results of these probes and alarmed by their unprofessionalism and by the egregious contradictions in the testimonies of ocular witnesses, the Puerto Rico Senate decided to launch its own investigation of the matter. The Judiciary Committee of the Senate promptly hired an experienced

---

[1] See e.g. *In Re San Juan Star* 662 F.2d 108 (1st Cir. 1981); *Colón Berríos* v. *Hernández Agosto,* 716 F.2d 85 (1st Cir. 1983); *Hernández Agosto* v. *Carlos Romero Barceló,* 748 F.2d 1 (1st Cir. 1984). The opinions of the Supreme Court of Puerto Rico related to the so-called Cerro Maravilla case, apart from the judgment herein appealed from include the following: *Soto* v. *Srio. de Justicia,* 112 D.P.R. 477 (1982); *Peña Clos* v. *Cartagena,* 114 D.P.R. 576 (1983); *Romero Barceló* v. *Hernández Agosto,* 115 D.P.R. 368 (1984).

Also, this is the third time that this Court has been asked to review or stay a decision of a lower court related to the Cerro Maravilla: See, *Corchado Juarbe* v. *Aponte Pérez,* No. 84-373, *cert. denied* 105 S.Ct. 331 (1984); *Romero Barceló* v. *Hernández Agosto,* No. A-316 application for a Stay denied 105 S.Ct. 318 (1984).

investigator, who for more than a year labored quietly but tenaciously, interviewing witnesses, gathering evidence and reviewing the reports of the four previous local and federal probes. Thereafter, the results of his investigation were presented to the Committee, via televised hearings. For a judicial recognition of the impact of these hearings on the Puerto Rico public opinion, see *Colón Berríos* v. *Hernández Agosto*, 716 F.2d 85, 86 (1st Cir. 1983).

The Senate investigation completely destroyed the conclusions of the four official probes. Relying on the testimony of ocular witnesses whom the previous local and federal investigators had slighted or disbelieved, of expert witnesses and of three policemen who participated in the Cerro Maravilla stake-out and testified under immunity, the Senate proved to all who wanted to see and hear that the policemen in Cerro Maravilla had apprehended the young men, beat them up and executed them by firing squad while the victims knelt, handcuffed. The investigation, moreover, showed conclusively that there had been a cover-up at the local level and raised the distinct possibility of cooperation by federal personnel in the cover-up. All of the appellants herein testified before the Judiciary Committee during the course of the Senate investigation.

The Senate investigation was so successful that the federal government launched a third investigation which culminated in criminal indictments against ten policemen who were active participants in the Cerro Maravilla operation. These policemen have been convicted of *perjury* in depositions taken in federal proceedings and most are at present serving jail sentences. The following federally convicted felons: Rafael Marrero Morales, Nelson González Pérez, An-

gel Pérez Casillas, Jaime Quiles Hernández, Rafael Torres Marrero, Juan Bruno González, William Colón Berríos, José Ríos Polanco and Nazario Mateo Espada are all appellants in this case.

In 1985 the Puerto Rican Legislature passed a Bill, Law No. 1 of January 18, 1985, creating the office of Independent Special Prosecutor and granting it full, exclusive and absolutely independent authority to prosecute any person who has committed any crime related to the events of Cerro Maravilla. Appellants herein had been charged with murder and perjury before the office of the Special Prosecutor was created. Subsequently the Special Prosecutor amended the murder and perjury charges. See Appellants Appendix 14. The perjury was allegedly committed by appellants in testimony given before the Judiciary Committee of the Senate of Puerto Rico. A motion to dismiss the charge for perjury, based on the argument that the applicable statute was article 4 and 5 of the Political Code instead of Section 225 of the Penal Code, was granted by the trial court and finally denied by the Supreme Court of Puerto Rico in the Judgment appealed from.

These are the facts which gave rise to the instant suit. As we can see, appellant's statement that "on July 25, 1978 two young men. . . members of a terrorist group died in a confrontation with police as they were about to carry terrorists acts. . ." is wholly misleading. See Jurisdictional Statement p.4. Although appellants presumably have their own version of what happened at Cerro Maravilla and could presumably prevail at trial, the Commonwealth of Puerto Rico through the office of Independent Special Pros-

ecutor has instituted criminal charges of perjury against appellants.

ARGUMENT

1. This Court has no jurisdiction on appeal under 28 U.S.C. 1258(2) when the validity of a Commonwealth statute has not been "drawn in question" as being repugnant to the Constitution or Laws of the United States and there has been no decision "in favor of its validity."

Under 28 U.S.C. 1258(2) final judgments of the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by this Court on appeal where "is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States and the decision is in favor of its validity." As appellants themselves admit, the alleged federal question presented in this case was not presented before the trial court or the Supreme Court of Puerto Rico, but was raised for the first time in the Jurisdictional Statement. See Jurisdictional Statement, p. 6. In these circumstances it is impossible to comply with the requirements of 28 U.S.C. 1258(2). Since no federal question was presented to the Supreme Court of Puerto Rico, no statute of the Commonwealth could have been drawn in question as repugnant to the Constitution or laws of the United States and there could be no decision in favor of its validity.

2. This Court has no jurisdiction to review the judgment of the Supreme Court of Puerto Rico, either on appeal or certiorari, for the following reasons:

a) The alleged federal question raised by appellants was not properly or timely presented before the Supreme Court of Puerto Rico and was not addressed by that Court.

In order for this Court to have jurisdiction over a federal question raised on appeal or certiorari, the question must have been properly presented in the state court proceedings. *Cardinale* v. *Louisiana,* 394 U.S. 437, 439 (1969); *Illinois* v. *Gates,* 462 U.S. 213, 218-20 (1983); 28 U.S.C. 1258(1) and (2) (on appeal a statute must have "been drawn in question"); 28 U.S.C. 1258(3) (on certiorari a right must have been "specially set up or claimed"). As we have pointed out appellants alleged federal question was first raised in the jurisdictional statement before this Court. This is, of course, too late. See, *Raley* v. *Ohio,* 360 U.S. 423, 434-36, (1959); *White River Lumber Co.* v. *Arkansas ex rel appeal gate,* 279 U.S. 692, 700 (1929); *Whitney* v. *California,* 274 U.S. 357, 362-63 (1927).

Appellants attempt to characterize the judgment below as a "surprise" decision is ludicrous. This Court has held that when the federal issue arises or is born from an unexpected or "surprise" decision of the state court and a petition for rehearing presenting the federal question is denied, the federal claims have been adequately presented and there is jurisdiction on appeal or certiorari. *Herndon* v. *Georgia,* 295 U.S. 441, 443-44 (1935); *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 366-67 (1932); *Saunders* v. *Shaw,* 244 U.S. 317, 320 (1917). The decision of the Supreme Court of Puerto Rico in this

case was not at all unexpected and the federal issue was not born in that judgment. Appellants had been charged with a violation of Section 225 of the Penal Code for allegedly lying in testimony before the Senate Judiciary Committee. Appellants Appendix p. 14. The defense requested the dismissal of the charges on the ground that the applicable statutes were articles 33 and 34 of the Political Code. The office of the Independent Special Prosecutor countered with the argument that Section 225 was controlling because the text included perjury committed before legislative "bodies". Furthermore, argued the prosecution, articles 33 and 34 of the Political Code had been repealed by Section 225 of the Penal Code. The Supreme Court, in the judgment appealed from, merely adopted some of the constructions of the statutes urged by the Special Prosecutor. Therefore, from the very beginning appellants were on notice of the possible interpretation which was eventually adopted by the Supreme Court of Puerto Rico and of which they now complain. Appellants statements that no one "could have previously foreseen" the judgment of the court below or that the court "engaged in a construction of the state (sic) statute in an unforeseeable fashion" are patently unfounded.

If the alleged inconsistency of the construction adopted by the Commonwealth Supreme Court with federal constitutional principles had been presented to the Courts, it would have had the opportunity to consider such questions in construing the statute. Indeed one of the most powerful reasons for the existence of the jurisdictional requirement of timely and proper presentation of the federal question is that "it is important that state courts be given the first op-

portunity to consider the applicability of state statutes in light of [federal] constitutional challenge, since the statutes may be construed in a way which saves their constitutionality" *Cardinale* v. *Louisiana,* 394 U.S. 437, 439 (1969). To argue that in the circumstances of this case the federal issue need not be presented in Commonwealth courts is completely frivolous and would stand the "surprise" exception on its head.

Even if the judgment below could be considered as a surprise or unexpected decision, appellants failed to present the federal question in a petition for rehearing before the Supreme Court of Puerto Rico. If a litigant is surprised by a decision of a State Supreme Court the exception requires that the opportunity of presenting the federal issue before the State Supreme Court on a motion for rehearing be used by the aggrieved party. As Justice Blackmun wrote in concurring in the denial of certiorari in *Estate of Wilson* v. *Aiken Industries, Inc.* 439 U.S. 877, at 879:

> "It is well established that Certiorari will not be granted where a federal constitutional issue is raised here for the first time on review of a State Court decision. . . . There appears to be an exception to that rule, however, whenever the federal issue arose from an unanticipated ruling of the state Court, *the petition for rehearing presented the first opportunity to raise it, and that opportunity was seized.*"

In this case appellants did not even file a petition for rehearing before the Supreme Court of the Commonwealth of Puerto Rico. It is clear, therefore, that the alleged federal issue in this case, was not timely

and properly presented before the Commonwealth courts and this Court lacks jurisdiction over such question.

b. The judgment appealed from is not a "final judgment" under 28 U.S.C. 1258

Under section 1258 this Court has jurisdiction to review "final judgments or decrees" of the Supreme Court of the Commonwealth of Puerto Rico. In stressing the finality requirement this Court has repeatedly held that to be appealable or reviewable a judgment must "be final as an effective termination of the litigation and not of merely interlocutory or intermediate steps therein". *Market St. R. Co.* v. *Railroad Commission,* 324 U.S. 548, 551 (1945). To comply with the finality requirement a judgment has to be final not "only as to all the parties, but as to the whole subject matter and as to all the causes of action involved". *Collins* v. *Miller,* 252 U.S. 364, 370 (1920). If there are further proceedings contemplated generally the judgment has been held to be non final. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 477 (1975); *Flynt* v. *Ohio,* 451 U.S. 619 (1981); *O'Dell* v. *Espinosa,* 456 U.S. 430 (1982).

In the case of criminal proceedings the final judgment against a defendant is generally the sentence. *Berman* v. *United States,* 302 U.S. 211, 212 (1937); *Parr* v. *United States,* 351 U.S. 513, 518 (1956). Hence, a state court judgment that merely overrules a dismissal or demurrer to an indictment, or denies a preliminary hearing, lacks the necessary finality to be reviewable by this Court. *Flynt* v. *Ohio, supra, Polakow's Realty Experts, Inc.* v. *Alabama,* 319 U.S. 336 (1943); *Arcenaux* v. *Louisiana,* 376 U.S. 336 (1964). Under these principles the judgment below is

clearly non final and non reviewable. The judgment by the Supreme Court of Puerto Rico merely overrules a dismissal of the indictment or complaint granted by the trial court. The judgment now permits the criminal proceedings against defendants, herein appellants, to go forward. Such proceedings include, at least, a trial on the merits, sentencing and appellate procedures at the Commonwealth courts.

This Court has determined, however, that there are certain circumstances in which finality should be recognized even though "there are further proceedings in the lower state courts yet to come". *Cox Broadcasting Corp.* v. *Cohen, supra,* at 477. The circumstances which justified a finding of finality were divided into four categories in *Cox Broadcasting Corp., supra,* and each category was defined.

In the first category defined in *Cox,* "are those cases in which there are further proceedings, even entire trials, yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox Broadcasting Corp.* v. *Cohn, supra,* at 479. Such is not the case here since further proceedings at the trial court include a trial on the merits in which appellants could prevail. The second category includes the cases "in which the federal issue finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." *Id.*, at 480. This category is obviously not applicable to this case for the same reason that the first is not. The third category are those cases "where the federal claim has been finally decided with further proceedings on the merits in the state courts to come, but in which later review

of the federal issue can not be had, whatever the ultimate outcome of the case". *Id.*, at 481. Obviously, it is not even arguable that the judgment involved here falls within this category. There is no rule of law or procedure in Puerto Rico which would prevent appellants herein from presenting their federal claims for review before this Court if they finally are convicted and sentenced in the criminal proceedings below.

Finally the fourth category includes those cases "where the federal issue has been finally decided in the state courts with further proceedings pending in which the parties seeking review [in the Supreme Court] might prevail on the merits on non federal grounds, thus rendering unnecessary review of the federal issue by this court, and where reversal of the state court on the federal issue will be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in the state proceedings due to come." In these circumstances, "*if a refusal immediately to review the state court decision might seriously erode federal policy, the court has entertained and decided the federal issue. . .*" *Id.*, at 482-83. It is clear that this category is also inapplicable to the judgment below, since there is no federal policy which should be eroded by denying immediate review. In *Cox Broadcasting Corp.* v. *Cohn, supra,* the court found the finality requirement satisfied, despite the fact that there were further proceedings, including a trial on merits, to be had in the state courts, because delay of review until after trial, "will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule

of law and a statute the constitutionality in which is in serious doubt". *Id.*, at 485-86.

On the other hand, in *Flynt* v. *Ohio, supra,* this Court refused immediate review of the judgment by the Court of Appeals of Ohio denying a motion to dismiss the criminal complaints against defendants on the ground that they had been subjected to selective and discriminatory prosecution in violation of the Equal Protection Clause of the Fourteenth Amendment. Although there was, as Justice Stevens put it, an "interest in protecting magazine publishers from being prosecuted criminally because state officials or their constituents are offended by the content of an admittedly nonobscene political cartoon", *Flynt* v. *Ohio, supra,* (Justice Stevens, dissenting) at 623-24, the Court found "no identifiable federal policy that will suffer if the state criminal proceeding goes forward". *Id.*, at 622. If in *Flynt* the Court found no identifiable federal policy that would suffer by denying immediate review, then no such policy exists here *a fortiori.* Unlike *Cox,* and even *Flynt,* where activities arguably protected by the First Amendment could be subjected to criminal sanctions and the chilling effect that such possibility necessarily implies, the temporary validity of the judgment below not even remotely implies any such consequences. There is no discernable activity protected by the First Amendment that may be affected by denying interlocutory review in this case. The alleged federal issue in this case, by its own terms, is not operative prospectively. In other words, the argument that the construction given by the Supreme Court of Puerto Rico to the perjury statutes violates the *Ex Post Facto*—Due Process Clause of the Federal Constitution, is rele-

vant only to those defendants accused of perjury committed before the judgment of the Supreme Court of Puerto Rico. Thus, there is no state statute or doctrine that would subject future activity protected by the Federal Constitution to the shadow of civil or criminal sanctions. Therefore, there can be no federal policy that is eroded by denying interlocutory review. An application of the fourth category exception in this case would really "swallow the rule". *Flynt* v. *Ohio,* 451 U.S. at 622.

In conclusion there is no final judgment in this case and this Court lacks jurisdiction on appeal or certiorari.

C. Appellants *ex post facto*-due process argument does not present a substantial federal question.

Appellants have quoted correctly a number of decisions of this Court. It is true, for example, that an *ex post facto* law has been defined by this Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action, or that aggravates a crime or makes it greater than it was when committed." *Bouie* v. *City of Columbia,* 378 U.S. 347, 353 (1973); *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386, 390 (1798). It is also true that a State Supreme Court is barred by the Due Process Clause of the Federal Constitution from achieving precisely the same result by judicial construction. If a State Court construction of a criminal statute applied retroactively is unforeseeable and unexpected "the effect is to deprive [the defendant] of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime". *Bouie* v. *City of Columbia,* supra, 378 U.S.

at 354-55. Unfortunately for appellants these principles have nothing to do with the case at bar.

As to the *ex post facto* argument it must be understood that Section 225 of the Penal Code, under which appellants were charged with perjury, was enacted by the Puerto Rico Legislature in 1974 more than eight years prior to appellants testimony before the Senate Judiciary Committee. Furthermore, the attempt by appellants to categorize this case as within the *Bouie* v. *City of Columbia* doctrine, is completely misplaced and misleading. In *Bouie* this Court held that a criminal trespass statute in South Carolina, which by its terms prohibited only "entry upon the lands of another . . . after notice from the owner . . . prohibiting such entry. . .", could not be interpreted as prohibiting also "the different act of remaining on the premises after being asked to leave". 378 US at 355. Some negroes "sit in" demonstrators had entered a drugstore which extended service to negroes at all departments except the restaurant department and took seats in the restaurant without having received any notice that that department was barred to negroes. After they refused to leave upon being asked to do so they were convicted of violating the South Carolina criminal trespass statute mentioned above. Since there was nothing in the statute to indicate that it also prohibited the act of remaining on the premises after being asked to leave, the construction by the South Carolina Supreme Court, which included such conduct within the ambit of the statute and affirmed their convictions, deprived petitioners of rights guaranteed to them by the Due Process Clause. *Id,* at 355 and 362. The doctrine of *Bouie* and its progeny is totally

inapplicable to the facts of this case for various reasons.

First, the text of the statute herein involved, gave "fair notice" to appellants that their conduct was clearly prohibited. In *Bouie,* the statute specifically prohibited an act and failed to include the conduct which was later construed to be included within the statute. In other words, it prohibited only entry after notice prohibiting such entry but it did not prohibit the different act of remaining on the premises after being asked to leave. Here, Section 225 of the Puerto Rico Penal Code stated clearly that "any person having taken an oath to testify, declare, depose or certify truly before any competent Court, *body,* official or person in any of the cases in which such an oath may be administered by law," can commit perjury if he states as true and essential fact which he knows to be false. Any reasonable person should interpret the word *body* in the text to include "legislative bodies" since they are universally recognized as having the power to require testimony by oath.

In fact the phrase "crimes against nature" is inherently more ambiguous than the phrase "body. . . in any of the cases in which such an oath may be administered by law". *Rose* v. *Locke,* 423 US 48 (1975). Yet in *Rose* v. *Locke,* supra, this Court rejected a constitutional challenge to a State Court definition of "crimes against nature" which included forced cunnilingus, even though courts had "differed widely in construing the reach of crimes against nature to cunnilingus". *Id,* at 52 to 54. This Court also held *Bouie* v. *City of Columbia* inapposite stating that in *Rose* "there was nothing to indicate, clearly or otherwise, that respondents acts were outside the

scope" of the penal statute. In light of the above it is clear that there is nothing surprising or unexpected, from a textual standpoint, about an interpretation of the word "body" in a perjury statute which includes in the definition of such word, "legislative bodies" such as a Senate and a House of Representatives.

Second, the legislative history of Section 225 of the Penal Code clearly requires the construction that the Supreme Court of Puerto Rico adopted. The Penal Reform in Puerto Rico started in 1967. The original Bill for the Penal Code defined perjury in exactly the same terms as Section 225 does today, except that it did not include the word "body" in its list of "court, official, or person", before whom perjury could be committed. It was in the Bill of 1974, which was finally passed by the Puerto Rican Legislature, that the word "body" was included in the statute. As the Supreme Court of Puerto Rico points out in the judgment below, the Executive Director of the Counsel for the Justice Reform, Mr. Antonio Negrón García (now an Associate Justice of the Supreme Court of Puerto Rico), upon appearing before the Judiciary Committee of the House of Representatives at public hearings stated that the new statute extended the possibility of perjury to any body which he interpreted to mean "any type of institutions" which has "legislative, quasi-legislative or quasi adjudicatory functions." So the Supreme Court of Puerto Rico rightly concluded that the legislative intention was that Section 225 of the Penal Code penalized perjury committed before the Legislative Assembly.

Third, there are no prior decisions or opinions of the Supreme Court of Puerto Rico interpreting Sec-

tion 225 of the Penal Code of Puerto Rico or articles 33 and 34 of the Political Code. Therefore, appellants cannot point out to any precedent of the Supreme Court of Puerto Rico in particular which could have prompted them to believe that perjury before the Senate of Puerto Rico was not covered by Section 225 of the Penal Code. *See, Rose* v. *Locke, supra,* at 53. On the contrary, besides the text and the legislative history already discussed, and sufficient in their own right to dismiss appellants contrived argument, there are other factors that prevent any claim of lack of fair notice.

Fourth, the history of perjury in the United States, affords no relief to appellants. Perjury has been consistently recognized as the most serious of several offenses designed to protect the integrity of the information on which the government will rely. Thus, it has been the pattern in the United States to grade perjury as a felony, sometimes with penalties out of proportion to the offense. *See,* R. Perkins, *Criminal Law,* 455 (2nd Edition 1969); *Model Penal Code and Commentaries* (Official Draft and Revised Comments) Section 241.1, part II (The American Law Institute, Philadelphia, PA., 1980), P.94. Indeed, the penalty for perjury has generally exceeded those provided by Section 225 of the Penal Code of Puerto Rico. *See, Model Penal Code. . .* supra, at page 141-42. Thus, perjury has been almost unanimously classified as a crime involving moral turpitude or *malun in se. See* Note, 43 Harvard Law Review 117 (1929). Therefore, the circumstances of this case are a far cry from those in *Bouie* v. *City of Columbia,* supra, where this Court recognized that the restaurant "sit-in" was not conduct that could "be deemed improper or immoral."

378 U.S. at 362. After all, the application of the rule against surprising construction of statutes of *Bouie* v. *City of Columbia,* should depend to a certain extent "on the moral quality of the conduct". *Id.*

Fifth, the statutes of the States have been unanimous in condemning perjury before legislative assemblies. We have not been able to find a single instance of a state where perjury before legislative assemblies has not been punishable, in most instances as a felony. See, *Model Penal Code. . .*, supra, at 126-127. The statutes have referred to false statements in "official proceedings" or "where testimony is taken", or "where making a statement is required or authorized by law" or "where an oath or affirmation is or may be required or authorized by law"; but these broad terms or phrases have never been interpreted to exclude legislative assemblies. *Id.* In *Rose* v. *Locke,* supra, at 53 this Court held that the doctrine of *Bouie,* was inapplicable on the grounds, *inter alia,* that "other jurisdictions had already reasonably construed identical statutory language" in the same manner as the Supreme Court of Tennessee. This Court rejected *Bouie* even though there were, indeed, interpretations of state supreme courts which had interpreted the same identical language in a different manner. It was sufficient that *some* jurisdictions had interpreted the statute in the same way as the Supreme Court of Tennessee. In this case no court, that we know of, has construed a general perjury penal statute to exclude false statements made before legislative assemblies.

Lastly, in light of the above, appellants argument is reduced to complaining that the Supreme Court of Puerto Rico refused to apply the canon of construc-

tion which states that special statutes prevail over general statutes, i.e. that since articles 33 and 34 of the Political Code deal with the legislature it is a special statute which should prevail over Section 225 which is the general perjury penal statute. But the canons of constructions have never been absolute rules. In particular, the canon that a special statute will prevail over a general statute when they are in conflict is valid "unless it appears that the legislature intended to make the general act controlling". See, Singer, *Sutherland Statutory Construction,* Section 51.05, Volume 2A, page 499. In other words the legislative intent has always been paramount. The rule of special acts v. general acts, has never been thought to override the intent of the legislature. The Supreme Court of Puerto Rico has long recognized the principle stated above. *Ex parte Ramos,* 63 P.R.R. 356, 359 (1938); *Pueblo* v. *López Pérez,* 106 D.P.R. 584 (1977). Further, there are other canons of construction which require that whenever two laws are contradictory the duty of the Court is to examine the circumstances to determine the real legislative purpose, *Pueblo de Puerto Rico* v. *Bou Nevárez,* 111 D.P.R. 179 (1981), and that the Court has the duty to interpret a statute in a manner that will not result in absurd or unreasonable consequences. *Mercado e Hijos* v. *Junta Azucarera,* 95 P.R.R. 831 (1968); *Esso Standard Oil* v. *A.P.P.R.,* 95 P.R.R. 754 (1968). In this case the Supreme Court of Puerto Rico rightly recognized that it would be absurd to exclude the legislature from the term "body" in the perjury statute. "Instead of recognizing the legislative powers, we would be seriously curtailing and limiting its power if we gave a different treatment to witnesses who testify under oath before a legislative body and to those who testify

in a judicial proceeding or at the hearing before an administrative agency. There is no valid or logical reason for such classification." Appellants appendix 21. On top of the clear text of the statute and the clear legislative intent, the absurdity of construing the statutes in such a way that perjury before a legislative assembly is a misdemeanor while perjury before a court or an administrative agency is a felony, is simply too much.

In sum, the text, legislative history and common sense require the construction given to the perjury statute by the Supreme Court of Puerto Rico; the history of perjury in the United States classifies it as a crime involving moral turpitude or *malun in se*; all these states have statutes penalizing perjury before legislative assemblies, most as a felony, and there were no prior decisions by the Supreme Court of Puerto Rico overruled by the judgment below. In these circumstances it is plainly frivolous to argue that the construction of the statute made by the judgment below is "so unforeseeable and surprising an interpretation" of the perjury statute as to violate the due process rule announced in the *Bouie* case. *Black* v. *Romano*, 105 S. Ct. 2254, 2263, n. 17 (1985) (Justice Marshall concurring). Appellants conduct is particularly evil and their arguments are just a pretext for evading the law.

CONCLUSION

Appellants due process claim is not a substantial federal question, the question was not timely and properly presented before the Supreme Court of Puerto Rico, and the judgment below is not a "final judgment" under the terms of 28 USC 1258.

For the reasons stated the Court should dismiss the appeal for lack of jurisdiction.

Respectfully Submitted.

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